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Supreme Court of the United States

OCTOBER TERM, 1963

RAFAEL CRUZ,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITIONER'S REPLY BRIEF

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In the respondent's brief with respect to alleged observable evidence upon entry into an apartment the case of *People* v. *Loria*, 10 N. Y. 2d 363 at page 372, clearly renders such alleged evidence inadmissible:

> "The Fourth Amendment of the Constitution of the United States provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' It protects against 'unreasonable governmental intrusion' into the privacy of a person's home (*Silverman* v. *United States*, 365 U. S. 505, 511; *Jones* v. *United States*, 357 U. S. 493, 498), and any evidence discovered as a result of such an intrusion is now constitutionally tainted and in-

admissible in a State court (*Mapp* v. *Ohio*, *supra*). It has been held that it matters not that the evidence was in open view and disclosed by the officers' mere observation, (*Accarino* v. *United States*, 179 F. 2d 456); that it came to the officers' attention as the result of the defendant's abortive attempt to secrete or dispose of it (*Hobson* v. *United States*, 226 F. 2d 890; *Work* v. *United States*, 243 F. 2d 660); or that it was turned up after a more conventional search of defendant's premises (*Weeks* v. *United States*, 232 U. S. 383; *United States* v. *Jeffers*, 342 U. S. 48; *Taylor* v. *United States*, 286 U. S. 1; cf. *Hester* v. *United States*, 265 U. S. 57).

In the instant case, Detective Short, while in Perillo's apartment, observed the latter pick up the case containing the heroin from the bedroom floor and drop it out of the window. Unless the officer's presence in the apartment can be justified, it constituted an unlawful intrusion into the home, and the evidence thereby discovered would be inadmissible.

"The Fourth Amendment, as noted, condemns only those searches and seizures which are unreasonable (*Harris* v. *United States*, 331 U. S. 145, 150). A search is reasonable if conducted pursuant to a legal search warrant, by consent, or incident to a lawful arrest. In the present case, the search was not made under a search warrant. Nor was there on this record a consent search. There was, at most, acquiescence on defendant's part to talk to the officers inside Perillo's apartment, but Perillo would not open his door. It may hardly be said that the unlocking of the door by Perillo's wife was a consent to search the apartment, for entry gained by submission to authority after a threat to kick down the door is not entry gained by consent (*Johnson* v. *United States*, 333 U. S. 10, 13; *Amos* v. *United States*, 255 U. S. 313, 317; *Catalanotte* v. *United States*, 208 F. 2d 264, 268)."

Further, in none of the cases cited by the respondent's brief on pages 6 and 7 with respect to the alleged evidence was there an entry into a home or apartment but rather dealt with a seizure in a car, porch, boat and person.

The record reveals that the defendant was taken to the Police Station at 7:55 A. M. from his home and without counsel and the record is barren as to whether he was advised of his rights, was interrogated without counsel, for 9 to 10 hours and then booked at 6:00 P. M. at a time too late for arraignment of this type of charge in New York City Courts (f. 292), which again confirms the lack of probable cause for the arrest and violating the McNabb-Mallory-Spano rule.

Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant (*Aguilar* v. *United States*, 289 F. S. 33; *Jones* v. *U. S.*, 357 U. S. 497. The pocketbook could not have been lawfully seized under the circumstances much less the knife found hidden beneath clothing on top of a bureau drawer.

The lack of probable cause is further evident by the lack of an informer, much less a reliable informer and the record is barren that the police officers had consulted some kind of official list or had some information of some kind which had narrowed the scope of their search to Rafael Cruz and reasonable cause under Section 177 of the Code of Criminal Practice to believe he committed the alleged murder. There may be suspicion here and good faith but that is not sufficient. It is basic that an arrest without a warrant must stand upon firmer ground than mere suspicion and good faith. *Henry* v. *United States*, 361 U. S. 101.

The alleged assault of one Wong Sing, an unknown, who failed to testify at trial nor was there any proof offered that he had either signed a complaint or made any state-

ment at the police station must be discounted as fiction and an effort to establish probable cause for the arrest of the defendant but even there the description of three Puerto Ricans is abundantly insufficient and of shadowy substance, and so sparse that no arrest warrant could issue, and if it did it would lack probable cause.

In *Brinegar* v. *United States*, 338 U. S. 160 at page 175, "the substance of all the definitions of probable cause is a reasonable ground for belief of guilt." The officers had not observed the crime in its commission and therefore in the case at bar once the officers entered the apartment they began a fishing expedition and finding the concealed knife after searching several minutes as well as observing the pocketbook the purpose to search transcended the purpose to arrest and was unlawful. *Gilbert* v. *United States*, 291 F. 2d 586; *Lee* v. *United States*, 232 F. 2d 354; *Mapp* v. *Ohio*, 367 U. S. 643.

Lack of Consent

It must be affirmatively shown that there was no duress or coercion actual or implied. "Invitation" to enter one house extended to armed officers of the law who demand entrance are usually to be considered as invitations secured by force. *Judd* v. *United States*, 190 F. 2d 649 at 651.

When five (5) armed police officers without a search warrant in a murder case crowd around an apartment door it would appear obvious that there was not much else Carmen Reyes could do but remove the wire latch from the door. As the Prosecution concedes on page 9 of the respondent's brief that courts are rightfully hesitant to deem consent voluntary and in the case at bar Carmen Reyes had every reason to fear the outcome and could not expect vindication of her participation.

It would seem manifestly clear from the record that the action of Carmen Reyes in opening the door (f. 361) and then jumping into bed (f. 366) is highly inconsistent and it could easily be inferred that both parties had been sleeping at the time the police apparently crashed into the apartment.

Statement by Cruz at the Police Station

Cruz declared in his written statement (ff. 1117-64) that "Bolo" Perez a co-defendant who received 10 to 20 years stabbed Lopez which the respondent's brief inadvertently failed to state at page 3.

Wong Sun v. *United States*, 371 U. S. 471, at page 485, establishes in line with *Silverman* v. *United States*, 365 U. S. 505, that verbal evidence which derives from an unlawful entry and an unauthorized arrest is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.

In the case at bar from the record it is established that the knife was demonstrated to the defendant at the Police Station after long interrogation before a verbal admission came (f. 498) and said admission falls within the exclusionary rule

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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